

OGC HAS REVIEWED.

B+6

OPINION OF THE GENERAL COUNSEL

Government Construction Authorities

Part I - Issue

The Congress has authorized the Director of Central Intelligence to provide for a headquarters installation for the Central Intelligence Agency by acquisition of land and construction of buildings and has appropriated to the Central Intelligence Agency funds for the preparation of plans and specifications for the installation so authorized. The General Services Administration has asserted that it has an exclusive and pre-emptive statutory authority for the construction of public buildings unless specifically otherwise authorized by law and, therefore, should be the exclusive agent for the construction of the Central Intelligence Agency's building. The issue, therefore, is whether any statutory authority of the General Services Administration impairs the authority granted to the Director of Central Intelligence or would enable the General Services Administration to take over as a matter of right the construction of the Central Intelligence Agency's headquarters building.

Part II - Discussion

A detailed analysis of the pertinent statutes, rulings, hearings, and background material is contained in the attached Memorandum of Law. The multiplicity of statutes and their interrelation make it extremely difficult to refer to them without confusing those not familiar with the subject. We will, therefore, discuss here our understanding of the points involved without specific citation of statutes or other material.

The General Services Administration places its main reliance on a statute which states that its purpose is to enable the Administrator to provide suitable accommodations for certain specified Government entities and for other public buildings of the classes under the control of the Administrator and authorizing and directing him to acquire land and to cause to be constructed thereon adequate, suitable buildings for the purposes stated in the act. It appears to us that nothing in this act or in its background and history constitutes an exclusive and pre-emptive authority to construct public buildings or indicates any intent of Congress that there be an exclusive jurisdiction in the Administrator. On the contrary, this seems to be a general enabling act so that the Administrator will not have to get specific statutory authorization (which would otherwise be required) when funds

for construction are appropriated to the General Services Administration or when funds appropriated to other agencies are required (by the appropriation act) to be transferred to the General Services Administration for construction purposes. If Congress had meant this authority to be exclusive and pre-emptive it could easily have said so. The fact that it did not, coupled with other provisions discussed hereafter, leads us to the conclusion that Congress definitely intended that this not be an exclusive authorization.

The other provisions that speak most clearly in this respect are those that authorize the Administrator to construct buildings when requested by other agencies. In the event of such requests, available funds may be transferred to the Administrator. These provisions are clearly permissive and would be quite unnecessary if the basic statute on which they rely were pre-emptive.

We see no reason, therefore, why a clear-cut authorization to the Director to construct a Central Intelligence Agency building cannot run parallel and quite separate from the enabling authorization for the Administrator. The intent of Congress in this respect is emphasized by the fact that the only statute which appears at all exclusive is one requiring that no money shall be spent on any public buildings until after sketch plans together with outline descriptions and detailed estimates of cost shall have been made by the Administrator. The act which authorized the Director to construct a building for this Agency specifically exempts him from application of this provision that the Administrator approve plans and estimates. Even if we can read any intent into the basic enabling act to give the Administrator exclusive jurisdiction, and we cannot, we believe it would be clearly countered by this specific exemption for the Central Intelligence Agency's building.

The General Services Administration places reliance on the fact that their basic enabling act speaks of other public buildings of the classes under the control of the Administrator. They assert that general office buildings are a class of public buildings which have been put under control of the Administrator. Disregarding the question of whether the Central Intelligence Agency's building will be a general office building or will have such characteristics as to become a special purpose building, and thus by definition not subject to the Administrator's control, it appears to us as a matter of law that a building yet to be constructed does not automatically fall under the control of the Administrator even if it be a general office building. General office buildings were transferred to the Administrator under a reorganization plan. The Attorney General subsequently ruled that this plan was effective only as to buildings existing at that time and did not automatically give control over subsequent construction. In view of this ruling a current statute provides that

the Director of the Bureau of the Budget may transfer any office buildings, with certain specific exceptions that include special purpose buildings, to the custody of the Administrator. We believe, therefore, that no jurisdiction can be asserted by the Administrator until the Director of the Bureau of the Budget has made a determination on the specific and existing building. Insofar as the authority of the Director of the Bureau of the Budget in this respect is concerned, the same statute provides that nothing therein would impair or affect the authority of the Central Intelligence Agency. Therefore, as a matter of law, we believe the Director of the Bureau of the Budget could not take action to transfer the Central Intelligence Agency's building if such action would impair or affect the authority running to the Central Intelligence Agency. In this connection the Attorney General has held that the absolute authority of the former Public Buildings Administration over allotment of space in the District of Columbia, while normally applicable to new buildings, could not be exercised to remove a department or agency from a building specifically provided for its use by the Congress.

Part III - Conclusion

It is our opinion that the statutory authority running to the Director of Central Intelligence for the construction of a headquarters building is clear-cut and complete and is not subject to restriction by statutes running to any other branch of the Executive arm of the Government. The Director can exercise this authority independently, assuming full and complete responsibility for plans, specifications, contracting, and construction, or he may by agreement on terms set by him allocate any portion of the work to any other agency qualified to perform it. Unless Congress qualifies or amends the existing authorization, the only limitations on the Director are the availability of funds and the requirements of audit of expenditures by the General Accounting Office.

15/
LAWRENCE R. HOUSTON
General Counsel

Attachment - Memorandum of Law

OGC:LRH:jeb
Orig: DCI
cc: A-DCI
A-DD/S
Director of Logistics
General Counsel ✓

MEMORANDUM OF LAW

Government Construction Authorities

A. Statutes Pertaining to the Construction of a Central Intelligence Agency Building

1. The construction of a Central Intelligence Agency building was authorized by the Act of July 15, 1955 (Public Law 161), which provided in section 401 of Title IV:

"The Director of Central Intelligence is authorized to provide for a headquarters installation for the Central Intelligence Agency, in the District of Columbia or elsewhere, by the acquisition of land . . . and construction of buildings, facilities, appurtenances, utilities and access roads."

The same Act, in section 501 of Title V, further expands this authority, providing:

"The Secretaries of the Army, Navy, and Air Force are respectively authorized to proceed with the establishment or development of military and naval installations and facilities as authorized by titles I, II, and III of this Act, and the Director of Central Intelligence is authorized to proceed with the establishment of a Central Intelligence Agency Headquarters Installation as authorized by title IV of this Act, without regard to the provisions of sections 1136, 3648, and 3734, as respectively amended, of the Revised Statutes, and prior to approval of title to underlying land, as provided by section 355, as amended, of the Revised Statutes The authority to establish or develop such installations and facilities shall include in respect of those installations and facilities as to which family housing or the acquisition of land is specified in titles I, II, III, and IV of this Act, authority to make surveys and to acquire lands and rights and interests thereto or therein, including the temporary use thereof, by donation, purchase, exchange of Government-owned lands, or otherwise, and to place permanent or temporary improvements thereon whether such lands are held in fee or under lease or under other temporary tenure."

2. The initial appropriation for this building is provided by the Supplemental Appropriation Act, 1956, of which Chapter III provides:

"Central Intelligence Agency. Construction. For the preparation of detailed plans and specifications of a Central Intelligence Agency Headquarters installation and for other purposes as authorized by Title IV of the Act of July 15, 1955 (Public Law 161), to remain available until expended, \$5,500,000."

3. It is important to note that section 3734 of the Revised Statutes (40 USCA 267), from which the Director is specifically exempted by Title V above, provides:

"No money shall be expended upon any public building until after sketch plans showing the tentative design and arrangement of such building, together with outline description and detailed estimates of the cost thereof, shall have been made by the Administrator of General Services (except when otherwise authorized by law) and said sketch plans and estimates shall have been approved by the head of each executive department who will have offices located in such building . . ."

B. Position of the General Services Administration

4. Despite the clear language in the Act of July 15, 1955, authorizing the Director of Central Intelligence to acquire land and construct buildings for a Headquarters installation, the Administrator of General Services has indicated that he believes he possesses an exclusive and pre-emptive right to enter into contracts for and to supervise the construction of all Government buildings, including this one.

C. Statutes Pertaining to the Authority of the General Services Administration

5. The authorities of the Administrator with respect to the construction of public buildings are set out in Title 40 of the United States Code, in chapters 3, 6 and 10. The primary reliance of the Administrator is placed on chapter 6 (the relevant provisions of which are principally a codification of the Public Buildings Act of 1926, as amended).

6. Chapter 6 of Title 40 contains a number of related provisions pertaining to the authority of the Administrator to acquire sites and construct public buildings. Those sections following section 341 (the initial provision) are generally dependent upon the authority therein granted. (Section 342 authorizes the Administrator to prepare designs, drawings, estimates and specifications and to award contracts; section 346 places control of the assignment of space in the Administrator;

section 348 places responsibility for care, maintenance and protection in the Administrator, but all these sections apply only to "buildings constructed, extended or enlarged under the provisions of" section 341.)

7. Section 341 states:

"To enable the Administrator . . . to provide suitable accommodations . . . and for court houses, post offices, immigration stations, customhouses, Marine hospitals, quarantine stations, and other public buildings of the classes under the control of the Administrator . . . he is authorized and directed to acquire . . . such sites . . . as he may deem necessary, and to cause to be constructed thereon . . . adequate and suitable buildings. . . . The Administrator . . . is authorized to carry on the construction work herein authorized by contract or otherwise as he deems most advantageous to the United States." (Emphasis supplied)

8. Part of the difficulty in interpreting this statute lies in the meaning of the phrase "classes of buildings under the Administrator's control." Section 285 of Title 40 specifies the buildings under the control of the Administrator:

"All courthouses, customhouses, appraiser's stores, barge offices, and other public buildings outside of the District of Columbia and outside of military reservations which have been purchased or erected, or are in course of construction, or which may be erected or purchased out of any appropriation under the control of the Administrator of General Services, together with the site or sites thereof, are expressly declared to be under the exclusive jurisdiction and control and in the custody of the Administrator" (Emphasis supplied)

9. For further clarification of the Administrator's authority, one must turn to the Federal Property and Administrative Services Act of 1949, which created the General Services Administration. Subsequent revisions, applicable to the question at issue, were embodied in the 1950 amendment to the Act. This Act, as amended, is codified as chapter 10 of Title 40.

10. 40 USC 474 provides that nothing in Chapter 10 and certain other portions of the Code not here relevant shall "impair or affect any authority" of certain Federal agencies, including the Central Intelligence Agency.

11. 40 USC 490 (a portion of Chapter 10) contains several provisions of interest in interpreting the scope of authority of the

Administrator, specifically:

(a) Gives the Administrator certain authorities in the operation of public buildings whenever such operation "has been or hereafter may be authorized by any provision of law other than this subsection."

(b) Provides that the Administrator is authorized to operate any public building when requested to do so by the occupying agency.

(c) Provides that the Administrator is authorized to acquire land, prepare plans and to contract for and supervise the construction of public buildings when requested by Federal agencies which have funds for such buildings.

(d) Authorizes the Director of the Bureau of the Budget to transfer the operation of any public office building to the Administrator whenever he considers such action in the interest of economy or efficiency, but subjects this authority to certain exceptions which include

"any building which the Director of the Bureau of the Budget finds to be a part of a group of buildings which are: (A) located in the same vicinity; (B) utilized wholly or predominantly for the special purposes of the agency having custody thereof; (C) not generally suitable for the use of other agencies."

12. In interpreting the authority granted to the Director of the Bureau of the Budget by section 490 (d), the Legislative History may be helpful; 1950 U. S. Code Cong. 3559 states:

"Section 490 (d) is necessary to remedy a condition which exists in Reorganization Plan No. 18 of 1950. Section 2 of that plan transfers all functions with respect to the operation, maintenance, and custody of office buildings owned by the Government and of office buildings or parts thereof acquired by lease, with certain specified exceptions, from the respective agencies in which then vested, to the Administrator of General Services. The provisions of the plan took effect on July 1, 1950. Under one interpretation of section 2 of the plan, the transfer of functions is not continuing, but is a so-called one-shot proposition. Section 490 (d) gives to the Director of the Bureau of the Budget, whenever he determines such action to be in the interest of economy and efficiency, authority to transfer to the Administrator all functions vested in any other Federal agency with respect to the operation, maintenance, and custody of any

office building owned by the United States, or any wholly owned Government corporation or any office building or part thereof occupied by any Federal agency under any lease, with certain specified exceptions. The enactment of this legislation granting continuing authority to the Director of the Bureau of the Budget will permit flexibility and meet future changing conditions."

13. Reorganization Plan No. 18 of 1950 was prepared by the President pursuant to the Reorganization Act of 1950. It transfers to the Administrator of General Services certain functions relating to Government buildings. Section 2, summarized above, pertains to the operation, maintenance and custody of office buildings. Section 1 transfers to the Administrator "all functions" pertaining to the leasing of space and its assignment and to the assignment of space in Government-owned buildings, "from the respective agencies in which such functions are now vested."

14. To summarize the combined effect of section 205, Reorganization Plan No. 18 of 1950, and section 490 (d):

Section 205 gave the Administrator control of buildings constructed from appropriations under his control. Reorganization Plan No. 18 of 1950 transferred control over space acquisition and assignment in all other public buildings, with stated exceptions, to the Administrator. The passage of section 490 (d), as its legislative history indicates, was required simply because the interpretation of the two previous provisions left after-acquired public buildings outside the control of the Administrator.

15. The authority of the Director of the Bureau of the Budget, under section 490 (d), pertains only to buildings already constructed; there is nothing in that section to take the supervision of construction itself out of the hands of the authorized agency head--in this case, the Director of Central Intelligence. Two opinions of the Attorney General indicate that the authority granted by section 490 (d) is subject to clear limitation:

(a) When the Secretary of the Interior (as successor to the Public Buildings Commission) sought to place elements of his own Department in a newly-constructed building authorized by Congress for the Interstate Commerce Commission, the Attorney General held that the statutory authority of the Secretary, vesting him with "the absolute control of and the allotment of all space in the several public buildings . . . in the District of Columbia", had been limited by the Congress in specifically designating the building for occupancy by a named agency. (1933) 37 Op. Atty. Gen. 340.

(b) When asked by the President to comment upon the scope of authority of the Public Buildings Administration to control and allot space in the public buildings of the District of Columbia, the Attorney General held that the Administration, as successor to the earlier Commission, "has the final authority over the control and allotment of space in all public buildings in the District of Columbia save only those buildings expressly excepted from its jurisdiction . . . subject to the limitation against removing a department or agency from a building provided for its use by the Congress." (1941) 40 Op. Atty. Gen. 140.

Although 40 USC (d) was enacted subsequent to these opinions, the statutory language subjected to limitation by the Attorney General was stronger than is that in 40 USC (4); it is also noteworthy that the Attorney General sought to apply a rule of reason, independent of the precise statutory language.

16. 40 USC 267 gives the Administrator a measure of control over all public buildings prior to construction by providing that he must approve sketch plans and estimates, but Title V of our authorization Act (Public Law 161) specifically exempts the Central Intelligence Agency from this section.

17. The Administrator has a further general authority applicable to all public buildings, but this authority is not in question here. Under 40 USC 254 he may act aside the selection of a site for any public building when in his opinion the selection has not been made solely with reference "to the interest and convenience of the public as well as to the best interests of the Government."

18. The various statutory provisions previously cited are highly interrelated. In fact, it would seem that the only sections, that might be relied upon by the Administrator in support of his position, which stand on their own feet are sections 341, 254, 267 and 40 (d). All the others are applicable only to buildings which by virtue of some other authority have come under the Administrator's control, or buildings which he has been requested to construct or operate by the agency concerned. Of these self-supporting sections, CIA has been specifically excluded from the provisions of 267 and has been excluded from 40 (d) so far as the exercise of the authority therein contained might "impair or affect its own authorities." Section 254 is a negative authority which may be exercised to act aside site selection, a point not here in issue. Although section 341 provides an authority to construct, there is nothing in its language indicating that this is an exclusive authority, and, in fact, the related provisions cited above lead to a contrary conclusion. It would appear that section 341 is in the nature of a

continuing authority to the Administrator to expend, for construction and other acquisition of office space, such funds as may be appropriated to him by the Congress. Those sections providing for the transfer to him of funds for similar purposes appropriated to other agencies, are all permissive, rather than mandatory, in nature.

D. Position of the Central Intelligence Agency

19. The Central Intelligence Agency would prefer to avail itself of the technical competence of the General Services Administration, and especially of the Public Buildings Service, in effecting the construction of its Headquarters building. In fact, the two agencies have worked closely together in planning such a building since it was first conceived. This was made clear in appearances before the Senate Armed Services Committee. On page 348 of the hearings on S. 1765, the following exchange is reported:

Senator Case. I notice you had consulted the Public Buildings Service in working up your plans. Would they be expected to supervise the construction?

Mr. White. We had expected to work with the Public Buildings Service in this, sir. We had prepared all our plans with them and plan to select an architect with them and work with them jointly in letting our bids although the language of the appropriation is intended to appropriate the funds to us.

Senator Case. The language does. It places the authorization in you. Has any consideration been given in placing the actual construction with the Public Buildings Service or the Corps of Engineers?

Mr. Dulles. We had not expected to place it with the Corps of Engineers, sir. We had expected to do it in conjunction with the Public Buildings Service. We plan to work it with them and not with the Corps of Engineers.

20. That portion of the hearings quoted above is also a clear indication of the Committee's intent to place the authority for the construction of this building in the Director of Central Intelligence, an intent embodied in the actual authorization language, and one consistent with the special responsibility for safeguarding intelligence sources and methods imposed upon the Director by the National Security Act of 1947 and the Central Intelligence Agency Act of 1949.

21. The Central Intelligence Agency has many unique functions quite dissimilar from the normal functions of Government agencies

generally. For the fulfillment of these functions certain special facilities and arrangements will be required. Because of the nature of the Agency's mission extraordinary security precautions must be observed. The Director and his staff, long accustomed to working under these special responsibilities imposed by the Congress, are uniquely qualified to assess the needs of the Agency and to make provisions to meet such needs. In this Agency's organic legislation and consistently thereafter, the Congress has recognized that peculiar technical problems and security considerations require the Agency's exemption from certain of the normal restrictions of Government. As applicable to the instant situation, this attitude of the Congress is exemplified in the provision that nothing in the Federal Property and Administrative Services Act of 1949 should "impair or affect" any authority of the Central Intelligence Agency, and in the Act of July 15, 1955, specifically authorizing the Director of Central Intelligence to provide a headquarters installation for his Agency.

22. In our opinion, there is not in the law of the United States any provision conferring upon the General Services Administration the exclusive right to exercise construction authorities granted by name to other agencies or their heads.

23. In the Supplemental Appropriations Act, 1956, which made the initial appropriation for the Central Intelligence Agency building, funds are also provided to construct an additional building for the Smithsonian Institution and for planning the extension and remodeling of the State Department building.

(a) A specific authorization was provided for the Smithsonian building in the Act of June 26, 1955; such a specific authorization was necessary because several agencies are participating in the construction of this building and the authorization spells out in exact terms the function of the Administrator of General Services, the Regents of the Smithsonian, the National Capital Planning Commission and a joint Congressional Committee.

(b) More typical is the provision appropriating funds for the State Department building extension. The supervision of the General Services Administration is specified and the appropriation language contains the direction that the funds appropriated are to be transferred to the Administration. It should be noted that in this case there was no special authority passed by the Congress since the funds are to be expended by the Administration, which has a continuing authority to construct public buildings when appropriated funds are available.

(c) In other instances, as when a building was to be constructed for the Department of State in New York City, direct appropriation has been made to the General Services Administration.

(d) In summary, a survey of recent statutory language connected with building construction indicates that where the General Services Administration is to be the contracting authority, appropriations are made directly to it, or to another agency with the direction that the funds will be transferred to the Administration.

24. If the Administrator's contention that he has a pre-emptive authority to construct all public buildings is correct, then the only reasonable inference to be drawn is that Congress provided special authorization for the Central Intelligence Agency building in the Act of July 15, 1955, to no purpose, since, had the Congressional intent been for the General Services Administration to construct the building, no special authorization was required. It is difficult to accept this interpretation.

25. Because of the unique security and operational requirements of the Central Intelligence Agency, a building constructed for Agency use could not be, without extensive modifications, considered a general purpose office building. Among the important problems which must be considered are the following:

(a) The observance of the "need to know" principle in the safeguarding of classified information, which probably comprises a higher proportion of this Agency's business than is true of any other agency of Government, requires physical compartmentation far in excess of that which might be dictated by considerations of efficiency alone. Components must be separated each from the other in accordance with their diverse duties, and within certain components a further subdivision must occur. There are numerous instances where private or semi-private offices might be required for security reasons, when in general Governmental practice the grade or general functions of the office-user would entitle him only to allocation of floor space within a much larger room.

(b) It is necessary for this Agency to circulate internally an estimated thirty thousand items of classified information daily. The security problem thus presented was a strong factor in influencing the Congress to provide the Agency at this time with authorization for the construction of a single building, so that the risk presented by inter-building communications could be eliminated. Even within a single building, in line with the Director's responsibility to protect intelligence sources and methods from unauthorized disclosure, special modes of communication will be required. These will include internal electronic communications, chutes, pneumatic tubes, and other devices as appropriate.

(c) This Agency must store an extraordinary amount of highly classified material, both current and reference, and for this purpose vault space will be required in a proportion probably far higher than would be true of any other agency. This is not archival material,

but material to which ready access is required. The timeliness of intelligence, if it is to be of value, requires that access should be immediate access. The problem is not simply one of highly secure record storage, but of rapid access as well.

(d) The internal compartmentation of the Agency, when coupled with its special responsibilities, will require a multiplication of entrances to the building and reception facilities (with some flexibility for their rearrangement) different in kind and quantity from those required by other agencies. An elegant reception hall would be of no benefit to the Agency, but the large number of plain, individual reception rooms required may well be more costly, and less adaptable to other agencies' needs.

26. The foregoing are typical but not inclusive of the special requirements of a building for this Agency. No mention has been made of laboratory and other facilities, nor of the irreplaceability of the collected records. The purpose is merely to demonstrate by a few examples that what this Agency requires for effective and secure operation cannot well result in a building which could, by any common understanding of the term, be called a general purpose office building.

B. Conclusions

27. Authority for the construction of a Central Intelligence Agency Headquarters installation runs directly to the Director of Central Intelligence, in both the authorization and appropriation acts.

28. The Central Intelligence Agency is specifically exempted, in the authorization act, from the only provision (40 USC 267) which gives the Administrator a measure of control over all public buildings by requiring his approval of sketch plans and estimates prior to construction.

29. In the Federal Property and Administrative Services Act of 1949, from which 40 USC 490 (d) is derived, it is specifically provided that nothing therein can impair or affect the authority of the Central Intelligence Agency.

30. There is nothing in the language of 40 USC 341 to indicate that the construction authority therein granted to the Administrator is exclusive, especially in the face of a Congressional enactment to the contrary.

31. The special requirements of the Central Intelligence Agency in a Headquarters installation are such as to result in a building which would not be general purpose, but would require extensive modification for efficient and economical use by any other agency.

32. Since the Director of Central Intelligence has been

specifically authorized to provide for this building, and since there is no other provision of law derogating from this authority inferred by the Congress, the Director has the authority and primary responsibility for plans, specifications, contracts and construction.

OGC:RFB:mz

Orig: DCI

cc: A-DCI

A-DD/S

Director of Logistics

General Counsel